DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MIGDALIA STRIDIRON and DIGBY STRIDIRON, **Plaintiffs,** **v.** **MOBILE PAINT MFG COMPANY OF DELAWARE d/b/a THE NEW PAINT LOCKER and RONALD BENEDICT MORRISON,** **Defendants**	**CIVIL NO. 2002/44**

TO: Pamela Colon, Esq.
Douglas L. Capdeville, Esq.
CC: Hon. Raymond L. Finch, Chief Judge
Julie Berberman, Esq.

ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION

THIS MATTER came for consideration on Plaintiffs' Motion for Reconsideration of the July 24, 2003 Order denying Plaintiffs' Motion for Leave to File their First Amended Complaint. Defendants' filed opposition to the motion and Plaintiff replied to such opposition. By Order dated August 8, 2003, I noted that because Plaintiffs' motion raised objection to my jurisdiction to decide such motion, the matter should be decided by Chief Judge Finch. By Order dated December 5, 2003 Judge Finch recommitted the motion for my further consideration.

I. Regarding My Jurisdiction to Rule on Plaintiff's Motion to File the First Amended Complaint

> Title 28 U.S.C. § 636(b)(1)(A) provides that:
> ...a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted and to involuntarily dismiss an action.

Thus, a magistrate judge may be designated to hear and determine a motion to amend a complaint without violating 28 U.S.C. § 636(b)(1)(A).

Pursuant to Rule 72.1(a)(1) of the Local Rules of Civil Procedure, entitled "Nondispositive Motions," the magistrate judge is designated to "[h]ear and determine any pretrial motion or other pretrial matter, other than those motions specified in subsection A.2 below, in accordance with 28 U.S.C. § 636(b)(1)(A) and Rule 72 of the Civil Rules." The referenced subsection, Rule 72.1(a)(2), which is entitled "Dispostive Motions" echos the lifting of 28 U.S.C. § 636(b)(1)(A) with a few additions, not including motions to amend. Motions to amend are not specifically excluded from the types of motions that the magistrate judge has been designated to hear and determine under

the Local Rules of Civil Procedure.

Motions to amend are generally nondispositive. *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993); *Thomas, D.M.D. v. Ford Motor Co.*, 137 F.Supp.2d 575, 579, (D.N.J. 2001). Because motions to amend are generally nondispositive and motions to amend have not been specifically excluded from being heard and determined by the magistrate judge, I find that in this jurisdiction, the magistrate judge may decide motions to amend the pleadings. See *Fishbein Family Partnership v. PPG Indust., Inc*., 871 F.Supp. 764, 769 n.4 (D.N.J. 1994).

II. Consideration of Plaintiffs' Motion for Reconsideration of the July 24, 2003 Order

On July 18, 2003, Plaintiffs filed a Motion to File their First Amended Complaint which sought to add a cause of action for gross negligence Plaintiffs' motion contained no statement of reasons for such amendment and no citation of authorities upon which Plaintiffs relied. On July 8, 2003, Defendants filed and served opposition to Plaintiffs' motions including citations of authority for their contentions of prejudicial delay. Plaintiffs' reply was due within ten (10) days thereof [*i.e.* by July 22, 2003 see Fed. R. Civ. P. 6(a); LRCi 6.1]. ON July 24, 2003, the court entered an order denying Plaintiffs' motion (noting therein Plaintiffs' failure to reply). On August 7,

2003, Plaintiffs filed this Motion for Reconsideration.

Plaintiffs' motion states that Plaintiffs' attorney commenced a Territorial Court first degree murder trial on July 21, 2003 which trial concluded on July 25, 2003.[1] Plaintiffs assert that due to the tremendous amount of preparation necessitated by that trial, Plaintiffs' attorney inadvertently missed the deadline for filing of the reply. Plaintiffs offer that their "reply would have established a meritorious defense as to Defendants' claim of delay and prejudice." In furtherance thereof, Plaintiffs note that the parties were deposed on May 5, 2003 and that it was then that Plaintiffs first learned that the corporate defendant had never before permitted Benedict Morrison to drive in St. Croix; that neither the local corporate employer nor anyone else had provided Morrison with any instruction regarding driving requirements on St. Croix; and that the corporation did nothing to ensure that Morrison was competent to drive on St. Croix. Plaintiffs also cite Morrison's testimony

1. Plaintiffs speculate that it was highly likely that the Court was aware of Plaintiffs' attorney's participation in the murder trial. In fact I wasn't, but in any event participation in other matters does not alleviate an attorney's duty to guard due dates and the Court cannot be responsible to do so on her behalf. A stipulation for extension of time would likely have been provided by Defendants' attorney upon request, and if not, a timely motion therefor could have been filed with scant time taken from trial preparation.

that he was looking in the direction of Plaintiffs vehicle when he pulled into the roadway, striking Plaintiffs' vehicle. Plaintiffs argue that prior to such testimony there was no factual basis to support their claims for gross negligence. Plaintiffs do not offer any explanation for the two and one half month hiatus between the May 5, 2003 depositions and their Motion to Amend on July 18, 2003.

In opposition to the motion, Defendants argue that Plaintiffs' motion does not satisfy the standards for reconsideration and that Plaintiffs' evidence does not support the requested allegation of gross negligence.

Plaintiffs' Motion to File First Amended Complaint suffers from compound inter-related defects. As noted in the Order dated July 24, 2003, the motion is wholly non-compliant with the requirements of Fed. R. Civ. P. 7(b)(1) [LRCi 7.1(b)]. Further, to the extent Plaintiffs' reply (as offered in Plaintiffs' Motion for Reconsideration) is to be considered, such reply impermissibly raises new arguments (see *e.g.* Memo. Op. dated August 25, 1997 in *Filler v. Brand Scaffolding Services*, St. Croix Civ. No. 1993/231 and Memo. Op. dated August 12, 1997 in *Orlando v. HOVIC*, STX Civ. 1996/13, both citing *Schiffli Embroidery Workers Pension Fund v. Ryan Beck & Co.*, 869 F.Supp.

278, 281 n.1 (D.N.J. 1994) ["This court will not usually consider arguments raised for the first time in a reply brief..."]). However, notwithstanding such flawed pleadings, in consideration of the liberal policy regarding Rule 15(a) amendments of pleadings, the Court will exercise discretion and consider Plaintiffs' motion in context of the arguments raised by Plaintiffs in their Motion for Reconsideration.

Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend its complaint and the court to grant such leave "when justice so requires." In the absence of any apparent or declared reason...such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the other party by virtue of allowance of the amendment, futility of amendment, etc. - leave sought should, as the rules require, be "freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962). If an amendment would not survive a motion to dismiss, it is futile and will not be allowed. Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1474 (2001).

20 V.I.C. § 555 imposes a statutory limit on non-economic damage arising from a motor vehicle accident which limitation is inapplicable upon a finding of gross negligence or willful

conduct. Plaintiffs' proposed amendment seeks to plead gross negligence against all Defendants. Plaintiffs posit that allowing Morrison to drive on St. Croix without providing any instruction or direction regarding driving requirements and without ensuring that Morrison was competent to drive on St. Croix constituted gross negligence by Morrison's employer.[2] Regarding Morrison's gross negligence, Plaintiffs cite testimony that he was looking in the direction of Plaintiffs' vehicle and that he recklessly pulled into the roadway when he knew and saw that Ms. Stridiron was crossing his path.

Upon consideration, the Court finds that Plaintiffs' argued basis for asserting gross negligence against the driver, Morrison may conceivably survive a motion to dismiss and ergo is not futile. Defendants' misgivings with regard thereto are better addressed by a dispositive motion fully briefed by the parties. However, Plaintiffs' contentions regarding the rationale for pleading independent gross negligence claims against Morrison's employer are clearly inadequate for such purpose and would not survive a dipositive motion.[3]

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2. Plaintiffs note hyperbolically, "In essence they gave him a gun without first determining he knew how to shoot."

3. Plaintiffs may still plead the employer's vicarious liability for Morrison's conduct (whether negligent or grossly negligent)

Defendants' opposition to Plaintiffs' Motion to File First Amended Complaint argues that Defendants would be prejudiced if such motion were granted. Pursuant to scheduling orders entered herein all factual discovery has been completed.

"Prejudice to the non-moving party is the touchstone for the denial of the amendment." *Lorenz v. CSX Corp*. 1 F.3d 1406, 1413 (3d Cir. 1993) citing *Cornell & Co., Inc. v. OSHRC*, 573 F.2d 820, 283 (3d Cir. 1978). An amendment will be denied if the movant establishes that it "was unfairly disadvantaged or deprived of the opportunity to represent facts or evidence which it would have offered had the...amendments been timely." *Id*. Incidental prejudice is not a sufficient basis for the denial of a proposed amendment. Prejudice become undue when a party shows that it would be "unfairly prejudiced" or deprived of the opportunity to present facts or evidence which it would have offered. *Morton International, Inc. v. A.E. Staley Mfg. Co.* 106 F.Supp.2d 737, 745 (D.C.N.J. 2000). However, neither the necessity for the defendant to conduct further discovery, nor the fact that the motion to amend was made after the filing of a motion for summary judgment, is considered sufficient to establish prejudice. See *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 569 (3d Cir. 1976).

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as Plaintiffs shall establish.

Because Plaintiffs have made a "colorable claim" to assert gross negligence against Defendant Morrison, they should be afforded the opportunity to test such claim on the merits. Defendants have not established the type of prejudice required to warrant denial of Plaintiffs' proposed amendment. In any event, the Court will allow Defendants to conduct additional limited discovery with regard to such amended pleading.

Accordingly and upon consideration of all pleadings herein, it is hereby;

ORDERED as follows:

1. Plaintiffs' Motion for Reconsideration of the July 24, 2003 Order is GRANTED and the July 24, 2003 Order is VACATED.
2. Plaintiffs' Motion for Leave to File First Amended Complaint is GRANTED, in part. Within ten (10) days of the date of this Order Plaintiffs shall serve and file a First Amended Complaint in accordance with this Order.
3. Defendants shall serve and file responsive pleadings within fifteen (15) days of service of such First Amended Complaint.
4. At their option, Defendants may conduct additional

factual discovery (limited to matters raised by the amended pleading) through January 16, 2004.

5. Any other scheduling matters necessitated by this Order will be addressed at the **February 2, 2004** scheduled status conference which will be changed from 11:00 A.M. to **3:00 P.M.**

ENTER:

Dated: December 15, 2003

_____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By:_____
Deputy Clerk